COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 13-6 April 24, 2014

Investigation by the Department on its Own Motion to Determine whether an Agreement entered into by Verizon New England Inc., d/b/a Verizon Massachusetts is an Interconnection Agreement under 47 U.S.C. § 251 Requiring the Agreement to be filed with the Department for Approval in Accordance with 47 U.S.C. § 252

HEARING OFFICER RULING ON COMPETITIVE CARRIERS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION AND BACKGROUND[1]

In this ruling, the Department of Telecommunications and Cable ("Department") denies CTC Communications Corp. d/b/a EarthLink Business; Lightship Telecom LLC d/b/a EarthLink Business; Choice One Communications of Massachusetts, Inc. d/b/a EarthLink Business; Conversent Communications of Massachusetts, Inc. d/b/a EarthLink Business; EarthLink Business, LLC (formerly New Edge Network, Inc. d/b/a EarthLink Business); Cbeyond Communications, LLC; tw data services llc; Level 3 Communications, LLC; and PAETEC Communication, LLC (collectively, "Competitive Carriers'") motion for summary judgment ("Motion"). Competitive Carriers' filed their Motion on March 28, 2014. On April 11, 2014, Quest Communications Company LLC k/n/a CenturyLink Communications LLC ("CenturyLink") filed its opposition to Competitive Carriers' Motion ("CenturyLink Opposition"); Comcast Phone of Massachusetts, Inc. ("Comcast") filed its opposition to Competitive Carriers Motion ("Comcast Opposition"); and Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon MA") filed its opposition to Competitive Carriers' Motion

[1] The background provided in this ruling is limited to a few recently filed documents in D.T.C. Docket No. 13-6. A more complete background of this proceeding may be obtained from reviewing the Department's Order Opening an Investigation, Declining to Issue an Advisory Ruling, and Denying Verizon MA's Motion to Dismiss or Stay the Proceeding and associated docket in the above captioned proceeding.

("Verizon MA Opposition"). Because the matter before the Department is one of first impression, and the benefit from a thorough record outweighs the potential efficiencies of summary judgment, the Department denies Competitive Carriers' Motion.

II. ANALYSIS AND FINDINGS

A. Legal Standard

A party may move at any time after the submission of an initial filing for full or partial summary judgment. 220 C.M.R. 1.06(6)(e). In determining whether summary judgment is appropriate, the Department will review the initial pleadings, pre-filed testimony, responses to discovery, and the memoranda of the parties. *See Petition of New England Tel. & Tel Co. d/b/a NYNEX for an Alternative Regulatory Plan for the Company's Mass. Intrastate Telecomms. Servs*., D.P.U 94-50, *Order* at 33 (May 12, 1995) ("*NYNEX Alternate Plan Order*") (citing *Investigation by the Dep't of Pub. Utils. on its own Motion into Allegations Contained in the Notice of Probable Violation Issued by the Dep't on Aug. 18, 1989 that IMR Telecom is providing Telecomms. Serv. Within the Commw. of Mass. without a Certificate of Pub. Convenience & Necessity & without an Approved Tariff for such Servs.*, D.P.U 89-212, *Order on Motion for Summary Judgment* at 18 (May 8, 1990) ("*IMR Telecom*")). Summary judgment is often used as a device to show that an evidentiary hearing is unnecessary in a proceeding. *See NYNEX Alternate Plan Order* at 33-34. The Department may grant full or partial summary judgment in its discretion where the pleadings and filing show that the absence of a hearing on an issue could not affect the Department's decision. *See Mass. Outdoor Advertising Council v. Outdoor Advertising Bd.*, 9 Mass. App. Ct. 775, 783-786 (1980); *See also, Hess & Clark Div. of Rhodia Inc. v. Food and Drug Admin.*, 495 F. 2d 975, 985 (D.C. Cir. 1974).

In determining the necessity for an evidentiary hearing, the Department has found the Massachusetts Rules of Civil Procedure ("MRCP") instructive. Under the MRCP, summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *See Petition of W. Mass. Elec. Co. pursuant to G. L. Ch. 164, §§ 76 & 94, & 220 C.M.R. §§ 1.00 et seq., for Review of its Elec. Industry Restructuring Proposal*, D.T.E. 97-120-3, *Interlocutory Order on the Appeal of the Attorney General of the Hearing Officer Ruling Regarding Prefiled Testimony* at 10 (Aug. 24, 1998) ("*Western Mass Elec.*"); *NYNEX Alternate Plan Order* at 33; *IMR Telecom* at 12.

B. The Department Denies Competitive Carriers' Motion Because This Docket Raises Important Issues Of First Impression And The Public Interest Is Best Served By Permitting The Parties To Develop A Complete Record.

The Department in its discretion has denied summary judgment where the issues to be resolved are too important or complex to be resolved summarily and the public interest would be better served through the development of a complete record. *See Western Mass Elec.* at 10 (finding the issues raised "too important and complex to deal with summarily"); *see also Aronson v. Commw.*, 401 Mass. 244, 253 (1987) (declining to order summary judgment in part due to the importance of the constitutional questions before the court) (citing 10A C.A. Wright, A.R. Miller, & M. Kane § 2732.2 (1983)). The present docket presents a circumstance where the Department finds it appropriate to develop a more complete record through the administrative hearing process in order to resolve this matter.

In their Motion, Competitive Carriers assert that the sole question before the Department is whether the Traffic Exchange Agreement and the VoIP-to-VoIP Agreement are interconnection agreements under 47 U.S.C. § 251 that must be filed with the Department for approval pursuant to 47 U.S.C. § 252. Motion at 2. According to Competitive Carriers, there is no genuine dispute of fact with regard to the Traffic Exchange Agreement and VoIP-to-VoIP

Agreement that Verizon MA has submitted to the Department are interconnection agreements under the applicable standard established by the Federal Communications Commission ("FCC").[2] Motion at 1, 3.

Verizon MA opposes the Motion, asserting that Competitive Carriers misstate and misapply the law, that there are material facts disputes, and the Department should seek a complete record that includes a full evidentiary hearing and post-hearing briefs prior to reaching a decision. Verizon MA Opposition at 2-3. Comcast supports Verizon MA's position and addresses two assertions in the Motion concerning Comcast's position in a FCC rulemaking proceeding and the propriety of Comcast's relationship with its VoIP affiliates. Comcast Opposition at 1-2. CenturyLink opposes the Competitive Carriers' Motion and asserts that public interest would best be served by resolving the issues on a complete record and therefore the Department should utilize its discretion to deny the motion for summary judgment. CenturyLink Opposition at 2-3.

The Department in reviewing the pleadings, pre-filed testimony, discovery materials, and other filings in this proceeding is not persuaded that an evidentiary hearing would serve no useful purpose. *Mass. Outdoor Advertising Counsel v. Outdoor Advertising Board*, 9 Mass. App. Ct. at 785-786; *see also Adjudicatory hearing in the matter of the complaint of Brian Michael Olmstead protesting rates & charges for electricity sold by Mass. Elec. Co.*, D.T.E./D.P.U 06-AD-1, *Order* at 28-29 (Sept. 17, 2012). Even if the Department agreed with Competitive Carriers that there were no genuine dispute of facts and the pending legal issues

[2] Competitive Carriers state, "[t]he standard is straightforward: the FCC has held that 'an agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be field pursuant to section 252(a)(1)'" Motion at 3-4 (citing *In re Qwest Commc'ns Int'l Inc. Pet. for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Sec. 252(a)(l),*WC Docket No. 02-89, Mem. Op. & Order, FCC 02-276, ¶ 8 (Oct. 4, 2002) (2002 Qwest Order).

could be resolved on existing record, CenturyLink is correct that this proceeding is addressing an important matter of first impression for the Department and the public interest would be better served through the development of a complete record. CenturyLink at 2-3. The Department's first look at the applicability of 47 U.S.C. §§ 251 and 252 to agreements for the exchange of voice traffic in IP format is important and warrants the development of a complete record. *See Western Mass Elec.* at 10 (denying summary judgment due to voluminous discovery issued and the importance and complexity of the issues raised); *see also Aronson v. Commw.*, 401 Mass. at 253 (declining to order summary judgment in part due to the importance of the constitutional questions before the court).

Further, the Department is not persuaded that the legal issues in this proceeding are as straightforward as Competitive Carriers claim. Motion at 3. The Department opened this proceeding in part because Congress gave state commissions direct authority to determine whether an agreement is an interconnection agreement (47 U.S.C. § 252), and the FCC has only provided limited guidance, deferring to the state commission to determine within the first instance what agreements fall within the scope of the statutory standard. *2002 Qwest Order* at ¶ 10-11. The Department will certainly benefit from a record that includes live testimony and post-hearing briefing, as it determines whether the agreements Verizon MA has submitted to the Department in this proceeding fall within the scope of statutory standard. *See Mass. Outdoor Advertising Counsel v. Outdoor Advertising Board*, 9 Mass. App. Ct. at 785-786; *Western Mass Elec.* at 10.

To be clear, in denying the Motion, the Department is not making a determination on the merits of any arguments asserted within the proceeding. Rather, the finding is only that Competitive Carriers have not met the Department's summary judgment standard, and the

Department believes that affording all parties further opportunity to develop and present their factual, legal, and policy assertions for the proceeding record through the evidentiary hearing and post-hearing briefings is in the public interest.

III. CONCLUSION

Accordingly, for the reasons discussed above, the Department DENIES Competitive Carriers' motion for summary judgment.

/s/ *Michael Scott*
Michael Scott
Hearing Officer

NOTICE OF RIGHT TO APPEAL

Under the provisions of 220 C.M.R. § 1.06(d)(3), any aggrieved party may appeal this Ruling to the Commissioner by filing a written appeal with supporting documentation within five (5) days of this Ruling. A copy of this Ruling must accompany any appeal. A written response to any appeal must be filed within two (2) days of the appeal.